

**MINUTES OF MEETING OF THE CORPORATIONS COMMITTEE**  
**April 8, 2005**

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held at the Marriott Hotel (Los Angeles Airport) on April 8, 2005. Attendance was as follows:

**MEMBERS PRESENT:**

Curt C. Barwick  
James F. Fotenos  
Steven K. Hazen  
Mark T. Hiraide  
Nina L. Hong  
Victor Hsu  
Brian A. Lebrecht  
Brian D. McAllister  
Stewart Laughlin McDowell  
Deborah J. Ruosch  
David Serepca  
Teri Shugart  
Lemoine Skinner III  
Jennifer Lynn Sostrin  
Steven B. Stokdyk  
Suzanne L. Weakley  
Bertha Cortes Willner  
Brian M. Wong  
Russell J. Wood

**MEMBERS ABSENT:**

Christopher A. Delfino  
Bruce R. Deming  
Matthew R. Gemello  
William R. Sawyers

**LIAISONS AND GUESTS PRESENT:**

Keith Bishop, Executive Committee Liaison  
Betsy Bogart, Secretary of State  
John Webber, NASD\*  
Gayle Oshima, Department of Corporations  
Rosalind Tyson, Securities & Exchange Commission\*  
Steve Harmon, Guest  
\*Via Telephone

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda that are not described in these minutes.

## **I. ADMINISTRATIVE MATTERS**

1. Opening Remarks and Announcements: The meeting was called to order by Co-Chairs Fotenos and McAllister at 9:30 a.m. Mr. Fotenos thanked the members of the Committee in attendance and informed them that a quorum was present.
2. Approval of Minutes of March Meeting: The minutes for the meeting on March 4, 2005 were approved in the form circulated (with minor corrections).

## **II. AGENCY AND LIAISONS' REPORTS**

1. Securities & Exchange Commission: Rosalind Tyson reviewed the newly approved Regulation NMS which contains four interrelated proposals designed to modernize the regulatory structure of the U.S. equity markets. Ms. Tyson reported that the substantive topics addressed by Regulation NMS were (i) order protection, (ii) intermarket access, (iii) sub-penny pricing and (iv) market data. Specifically, the so-called "Order Protection Rule" would require markets and trading centers to obtain the best price for investors when such price is represented by automated quotations that are immediately accessible. Ms. Tyson also announced that the Commission would be sponsoring a roundtable on the implementation of the Item 404 Internal Control Reporting Provisions on April 13<sup>th</sup>. Ms. Tyson also discussed a recently settled enforcement action against EasyLink Services Corporation (formerly known as Mail.com, Inc.), headquartered in Piscataway, NJ, for improperly recognizing and reporting advertising revenue from barter transactions in 2000 as a result of their failure to apply the appropriate accounting standards. Ms. Tyson also reviewed newly adopted Market Timing Rule 22(c)(2) requiring every fund to "consider" adopting a redemption fee or find that one is not appropriate. The Rule is effective May 23, 2005.
2. Department of Corporations: Gayle Oshima reported that this was "franchise renewal season" and that, as such, the Department was extremely busy processing hundreds of renewal application. By statute, the Department has fifteen days to review an application after submission. Ms. Oshima also reported that the committee formed by the Department to study the Uniform Securities Act of 2002 in order to determine whether it should be adopted in California in its entirety, partially or at all was preparing an initial draft of a Report (for internal discussion purposes only). Ms. Oshima also reported that the Department was reviewing recent legislation and rulemaking activity of interest to California corporate practitioners but, as of yet, had no position on any of the foregoing.
3. NASD: John Webber announced that several Notices to Members had been posted on the NASD's web site. Such Notices included, Notice to Members 5-17 (adopting new sanction guidelines), Notice to Members 5-20 (amending to Rule 1120 to eliminate certain exemptions from the Continuing Education Regulatory Element Requirements) and Notice to Members 5-26 (recommending best practices/policies and procedures for reviewing "new products").

4. Secretary of State: Betsy Bogart announced that Bruce McPherson had been formally sworn in as Secretary of State and that Cathy Mitchell had returned to her former position of Under Secretary of State. Ms. Bogart reported on several pieces of legislation of interest including (i) AB 241 (Harmon), a bill being sponsored by the Corporations Committee, which would allow the Secretary of State to file an agreement of merger for two or more non-corporate business entities (specifically, a domestic or foreign limited partnership, limited liability company or limited liability partnership) without receipt of a tax clearance certificate from the Franchise Tax Board. The bill instead would require the surviving business entity to assume responsibility for all tax liabilities of the disappearing entity. (Mergers involving two or more domestic or foreign corporations already are exempt from the tax clearance certificate requirement.), (ii) AB 339 (Harman), a bill being sponsored by the Partnerships and Limited Liability Committee to adopt the Uniform Limited Partnership Act (2001) and (iii) AB 180 to permit engineers and land surveyors to form limited liability partnerships.

### **III. SUBCOMMITTEE REPORTS**

1. Legislation: Mr. Stokdyk discussed the status of SB 627 (Ackerman) which would enact changes to the usury exemption set forth in Corporations Code Section 25118 (heading to the Judiciary Committee), AB 241 (Harman), previously discussed by Ms. Bogart (moving out of Committee) and (iii) SB 119 (Ackerman) clarifying certain terms in connection with the ability of a corporation to approve resolutions by unanimous written consent when an interested director abstains (has been amended).
2. Communication and Website Development: Victor Hsu informed the Committee that he was exploring the possibility of moving the Committee's current extranet (hosted by Fulbright & Jaworski) to an extranet similar to that currently used by the Franchise Law Committee. Mr. Hsu described the more robust features offered by the Franchise Law Committee's extranet and indicated that there would be a \$20 per month hosting fee. The Members of the Committee were encouraged to visit the site.
3. USA Subcommittee: Mark Hiraide reported that the subcommittee was preparing a summary and analysis of the Uniform Securities Act to be presented to the Committee in June or July.
4. Educational Activities: The Committee, led by Co-Chair Brian McAllister, briefly discussed upcoming programs and projects including programs being presented by the Committee at the State Bar Annual Meeting ("How to Organize a California Corporation" and "Recent Developments in California Corporate Law"). The Committee also discussed a Business Law News article being prepared by Russell Wood on Section 3(a)(10) hearings.

#### **IV. 2004-2005 AGENDA--OTHER PROJECTS**

1. Guide to Organizing a California Corporation. Ms. Shugart led a chapter-by-chapter discussion of the most recent draft of the revised Guide to Organizing a California Corporation. The Committee noted several changes that needed to be made. Ms Shugart indicated that she would make the proposed changes, with other members to supply updated materials, exhibits and inserts, as well. Another draft is expected shortly.
2. Opinions Report. Co-Chair Jim Fotenos indicated that he had received comments from members of the legal community in response to our request, and that he was integrating those comments into the Opinions Report.
3. Attorney Conduct Rules. Mr. Hazen noted that a draft letter had been prepared to R. William Ide, Esq, Chair of the ABA Task Force on the Attorney-Client Privilege. Mr. Hazen reported that the letter arose out of a question that he had been asked while testifying before the Task Force earlier this year. After reviewing the letter, the Committee upon motion duly made by Mr. McAllister and seconded by Ms. Weakley unanimously recommended that the letter be sent to the Executive Committee for its review and approval.
4. Close Corporation Model Act Adoption. Mr. Hazen complimented the subcommittee on its work, but expressed concerns regarding the size and scope of the project, as well as the fundamental change that was being proposed to the closed corporation rules. Mr. Hazen further indicated that he believe that the project was not the best utilization of the Committee's limited resources. Mr. Fotenos, Ms. Weakley and Mr. Serepca informed the Committee that the project was meant to be "organizational" to make the closed corporation rules more user friendly. Mr. Fotenos, indicated that the subcommittee should keep Mr. Hazen's concerns in mind as it continues with its efforts.
5. Corporations Code §191. Ms. Ruosch reported on the status of a draft technical amendment that was being prepared.
6. Commentary Annotations to National Venture Capital Association Model Forms. Mr. Skinner informed the Committee that he was looking for additional volunteers for the project.

#### **V. OTHER BUSINESS**

1. Executive Committee Officers' Retreat. Mr. Stokdyk reported on the recently attended Officers' Retreat and shared his thoughts and insights. In particular, he reported on recent activities and projects by other committees.

The meeting was adjourned at approximately 12:30 p.m.

/s/ Curt C. Barwick

Curt C. Barwick, Co-Secretary